NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-4186

DEMOCRATIC NATIONAL COMMITTEE, et al.

v.

REPUBLICAN NATIONAL COMMITTEE, et al.

EBONY MALONE,
Intervenor

REPUBLICAN NATIONAL COMMITTEE,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 81-cv-3876)
District Judge: Hon. Dickinson R. Debevoise

Submitted on Motion for Stay Pending Appeal
November 1, 2004

Before: SLOVITER, NYGAARD and FISHER, Circuit Judges

(Filed)

SUPPLEMENTAL OPINION

SLOVITER, Circuit Judge.

Appellate opinions should be thoughtful and reasoned. That was not possible with respect to the opinion filed yesterday. The court was faced with the emergency motion of the Republican National Committee to stay the order of Judge Debevoise of the District of New Jersey. We use this opportunity to file a brief explanation of our opinion filed November 1, 2004 because we recognize that we were unable to explain more fully our view on some of the issues raised.

We begin by some discussion of this court's jurisdiction. The consent decrees entered into between the Republican National Committee and the Democratic National Committee in 1982 and 1987 were both filed in the District Court of the District of New Jersey, which is within the jurisdiction of this court. We recognize that the State of Ohio is not within the jurisdiction of the Third Circuit, but we have an obligation to hear appeals from and motions to stay orders of the district courts within our jurisdiction. Because the Republican National Committee filed in this court its motion for a stay (filed approximately 6:00 p.m. yesterday), we were compelled to take jurisdiction over this matter.

We recognize that there was pending in the District Court for the Southern District of Ohio, but thereafter in the Court of Appeals for the Sixth Circuit, another suit concerning the conduct of the election. The opinion of the district court in that case concerned whether partisan poll watchers were permitted to challenge registered voters at the polls. The order of the District Court for the Southern District of Ohio enjoined that activity. The order entered by this Court did not rely on, nor was it dependent upon, the

Ohio District Court order. It was merely mentioned because it had been referred to by the District Court of New Jersey. The issue before the New Jersey District Court was whether a list of 35,000 voters could be used to challenge the eligibility of any or all of the voters so listed. While we recognize that the order of Judge Debevoise and of this court may, to some extent, be in tension with that of the Court of Appeals of the Sixth Circuit, which in a divided vote stayed the order of the Ohio District Court, we believe that the decisions are not necessarily so irreconcilable that the election officials in Ohio will be unable to fulfill their functions in the professional manner that characterizes the actions of election officials throughout the country.

The issue before this court concerns at most 35,000 potential votes by the persons whose names are on the list compiled, according to the findings of the District Court, by the Republican National Committee in conjunction with the Ohio Republican State Committee in violation of the consent decrees. At this juncture, it is not known how many of the voters on that list will present themselves at the polls. Hopefully, the results of this election will show that the 35,000 votes in Ohio will not be material to either the state or national election, in which case this opinion and our order will be of no moment. Nonetheless, we take this opportunity to discuss several of the legal issues that have been raised both by the RNC and the intervenor, and by our colleague in his dissent.

At the outset, we note that neither the dissent nor the RNC argues that the District Court's factual findings are unsupported by the evidence in the record. Instead, the difference lies in our view of standing and justiciability.

The RNC argues that Malone's claim is not justiciable because it fails to present a "case" or "controversy" under Article III section 2 of the United States Constitution. The "irreducible constitutional minimum" of Article III standing requires three elements: 1) the plaintiff must have suffered an "injury in fact"–an invasion of legally protected concrete, and particularized interest, which is "actual or imminent, not conjectural or hypothetical," 2) a causal relationship between the injury and the challenged conduct such that the alleged injury is fairly traceable to the challenged action of the defendant, rather than the result of an independent action of some third party not before the court, and (3) a likelihood that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

A. Injury in Fact

The injury Malone alleges is that she was included on a 35,000 name list of challenged voters, compiled by the ORP with assistance from the RNC, in violation of the 1982 and 1987 consent decree. The RNC planned to use this list, which disparately targeted voters from African American precincts, to challenge the rights of all 35,000 people on the list to vote in today's election, pursuant to Section 3503.20 of the Ohio Election code. Malone fears that this virtually certain challenge by partisan RNC poll watchers will impede her right to vote.[1]

[1] Because Malone is certain to be targeted by RNC challengers, her injury is not speculative. Cf. Summit County Democratic Central and Executive Committee, et al., v. Blackwell, et. al., Nos. 04-4311/4312 (6th Cir. 2004) (suggesting that potential injury to any voter which may occur at the polls is speculative).

Because "[a] citizen's right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution. . . .," Baker v. Carr, 369 U.S. 186, 208 (1962), Malone has alleged a concrete injury which is not conjectural, nor hypothetical.

B. Traceability

This alleged injury, if shown, is fairly traceable to the RNC's participation in the preparation and use of the 35,000 name list.

C. Redressibility

The RNC argues that irrespective of its potential challenge to Malone's eligibility using the 35,000 name list, Malone has already been "flagged" by election officials. Under Ohio State law, election officials must "flag" the names of persons to whom undeliverable mail has been sent, and require such persons to file a Form 10-U "Affidavit Oath Examination of Person Challenged" attesting to their eligibility to vote before they may cast a regular ballot.[2] Therefore, the RNC continues, because Malone will be "challenged" by the election officials regardless of any action taken by this court, her alleged injury is unredressible. We find this argument unconvincing.

The Sixth Circuit's stay order was entered by a panel in which the three judges took different positions. Judge Rogers, writing the lead opinion, believed that there is a significant question as to plaintiffs' standing but he assumed, without deciding, that the

[2] If the voter refuses to fill out the Form 10-U, the person is offered a provisional ballot.

plaintiffs have standing. However, he based his view that the possibility of delay and confusion at the polling place does not amount to a severe burden upon the right to vote and he thought that any injury to voters in addition to the greater delay and inconvenience is speculative. Judge Ryan, concurring, opined that the plaintiffs have not shown the requisite standing to warrant the injunctive relief granted them by the district courts, because they failed to demonstrate that they have suffered any injury in fact. Judge Cole, dissenting, would have found the requisite standing, that the public interest weighs in favor of allowing registered voters to vote freely, and that "hundreds of election Challengers to challenge voters at particular polls will cause chaos and uncertainty." He stated that "[a]ll that is needed is a showing that an injury is likely to occur to some group of voters. This potential injury, necessary for the purpose of standing, as well as for the merits of this case, was shown at the District Court level."

Requiring "flagged" voters to submit a 10-U Affidavit prior to voting is a very different burden than subjecting voters to the private, albeit state sanctioned[3], challenges of partisan poll watchers. According to declarations by the director of elections in Stark and Cuyahoga county, "flagged" voters can be processed quickly by polling station officials. Indeed, despite having "flagged" 180,221 registrants in Cuyahoga county alone, no disruptions are anticipated at the polls. Dillingham Decl. ¶ 17; Mathews Decl. ¶ 22. By contrast, the presence of partisan poll watchers armed with a targeted list of registrants

[3] Section 3503.20 of the Ohio Election Code, allows private parties, including RNC challengers, to challenge a person when attempting to vote.

has the potential for far greater disruption and voter intimidation.

It is important to note that Judge Rogers' opinion emphasizes that neither of the district courts in Ohio rely upon racial discrimination as a basis for finding a likelihood of success on the merits. On the other hand, the entire basis for the consent decrees that were approved by the District Court of the District of New Jersey was concern that the RNC was targeting for challenge neighborhoods primarily inhabited by African American voters, a showing that was made clear by the evidence presented at the hearing before Judge Debevoise. Numerous studies have documented the effect of poll watchers on African-American voters in particular. James Loewen, Continuing Obstacles to Black Electoral Success in Mississippi, Civil Rights Research Review, Fall-Winter 1981, p. 34. Indeed, the Supreme Court in Burson v. Freemon, 504 U.S. 191 (1992), found that permitting solicitation near the polls would cause voter intimidation. It necessarily follows that permitting the use of a race targeted challenge list by partisan poll watchers imposes an even greater threat of voter intimidation that is inconsistent with a free election.

We therefore concluded in the opinion filed yesterday that Malone's claim is justiciable and her alleged injury is redressible if this court prohibits the RNC's use of the 35,000 voter list.

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TO THE CLERK:

Please file the foregoing opinion

/s/ Dolores K. Sloviter
Circuit Judge